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Final Regulations Issued on Employer TRICARE Incentives

The Department of Defense has issued final regulations that provide guidance on application of the rules prohibiting employers from offering TRICARE-eligible employees incentives not to enroll in the employer's group health plan. In a separate development, the TRICARE Affirmation Act was signed into law, amending the tax code to provide that TRICARE meets the minimum coverage requirements under the new health care reform law.

Background

TRICARE, like Medicare, was intended to be a secondary payer to other employer-provided health care coverage. Nonetheless, prior to 2008, some employers were able to shift employee health costs to the Department of Defense (DOD) by offering TRICARE-eligible employees a TRICARE supplement as an incentive not to enroll in the employer's primary group health plan. The "John Warner National Defense Authorization Act for Fiscal Year 2007" (NDAA) sought to end this cost-shifting by prohibiting employers from offering financial or other incentives to TRICARE-eligible employees to not enroll, or to terminate enrollment, in an employer-sponsored group health plan that is or would be primary to TRICARE. The TRICARE incentive prohibition became effective January 1, 2008. On March 28, 2008, the DOD issued proposed regulations implementing the prohibition. (See our April 24, 2008 [For Your Information](#).) The DOD has now issued final regulations, which go into effect on June 18, 2010.

The Final Regulations

Like the proposed regulations, the [final regulations](#) confirm that employers generally cannot offer financial or other incentives to TRICARE-eligible employees (essentially military retirees and their family members) not to enroll in employer-sponsored health plans that otherwise would be primary to TRICARE. The final regulations state that the general prohibition against offering TRICARE incentives applies in the same manner as the employer prohibition against offering incentives to Medicare-eligible employees under the Medicare Secondary Payer rules. The TRICARE incentive prohibition applies to private and public sector employers with 20 or more employees, and subjects them to penalties of up to \$5,000 for each violation.

The final regulations state that under this general rule, employers may not offer TRICARE-eligible employees an alternative to the employer's primary coverage, except in the following limited circumstances –

- The employee has primary coverage other than TRICARE.

- The benefit is offered under a Section 125 cafeteria plan to all similarly situated benefits-eligible employees without regard to TRICARE eligibility.

BUCK COMMENT. *The DOD notes in the preamble that the regulations do not prohibit TRICARE eligible individuals from electing a cash option if offered to all similarly situated employees.*

- A TRICARE supplemental benefit is offered exclusively to TRICARE-eligible employees under a Section 125 cafeteria plan but the employer provides no payment for the benefit and receives no consideration or compensation for offering it. In addition, the employee's participation must be voluntary, and the employer must limit its involvement to providing administrative support for this benefit under the cafeteria plan. Further, the employer must document and maintain signed certification that these conditions have been satisfied, and provide this certification upon request by the DOD.

BUCK COMMENT. *Although Congressional intent was clearly to prohibit TRICARE supplemental plans, the DOD exercised its authority to provide this limited exception in the final regulations.*

TRICARE Affirmation Act

On April 26, President Obama signed into law the TRICARE Affirmation Act ([H.R. 4887](#)) which amends the tax code to provide that TRICARE meets the new minimum coverage requirements under the Patient Protection and Affordable Care Act (PPACA). Thus, individuals enrolled in TRICARE will be deemed to have satisfied the individual mandate under PPACA and will not be subject to penalties for failure to have minimum health insurance coverage.

Conclusion

The final regulations provide useful guidance on the use of cafeteria plans to provide benefits to TRICARE-eligible employees, and the limited circumstances in which TRICARE supplemental insurance plans can be offered. Buck's consultants would be pleased to discuss this latest guidance with you and its effect on your health plans.

This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.